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IN THE

Supreme Court of the United States

October Term 1969

No. 1156

GLENN W. HALL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, GLENN W. HALL, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this matter on December 15, 1969.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. No opinion was rendered by The District Court for the Northern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on December 15, 1969. Upon timely

application made to Mr. Justice Harlan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit, an order dated January 6, 1970 was granted herein extending petitioner's time for filing a petition for writ of certiorari to and including February 13, 1970.

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Whether or not "custodial interrogation" can only exist under circumstances indicating that something was said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, that they would not have heeded a request to depart or to allow the suspect to do so.

2. Whether or not petitioner acted freely and voluntarily when he executed the waiver of his rights under *Miranda v. Arizona*.

Statute Involved

The indictment against the petitioner contained but one count charging petitioner with a violation of Title 18 U. S. C. Section 2113(a) which, as far as is pertinent, reads as follows:

> § 2113. Bank Robbery and Incidental Crimes
>
> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association; or
>
> * * *

shall be fined not more than $5000 or imprisoned not more than twenty years, or both.

Statement of the Case

The jurisdiction of the United States District Court is based upon the fact that petitioner was accused and convicted of violating Title 18 U. S. C. Sec. 2113(a) which makes it a federal crime to rob a bank, the deposits of which are insured by the Federal Deposit Insurance Corporation.

At approximately 7:55 a. m. on December 12, 1968, Mrs. Christine Richer, the head teller of the Cicero branch of the Merchants National Bank and Trust Company of Syracuse, was followed into the bank by a masked bandit who, after herding the bank employees into the vault, made off with cash amounting to $37,872.44 (15-30, 92)*.

About ten minutes before the holdup, a young lady named Barbara Costick had dropped her brother off at a bowling alley located to the rear of the bank. As she drove into the bowling alley parking lot she noticed a maroonish or reddish colored car parked in the lot. After dropping her brother off she turned around, and as she again passed the reddish car she noticed that the man who was seated in it raised his arm as if to shield his face. Becoming suspicious, she noted the license number of the car and after proceeding about one hundred yards to the street she stopped her automobile and jotted down the license number on a card (93-96 Government's Exhibit 8). The number she wrote on the card was OA 1587. This was the license number of a 1967 red Chevrolet automobile registered in petitioner's name from January 31, 1968 to January 31,

* (Numbers in parentheses refer to pages in the trial transcript contained in the certified record.)

1969 by the New York State Department of Motor Vehicles (105, 290-91). Miss Costick gave the license number to a member of the Sheriff's Department at about 10:00 a. m. that morning (128-31).

At 4:22 p. m. on December 12, 1968, the day of the robbery, Special Agent Schaller, together with two other special agents of the F. B. I., arrived at the home of the petitioner at 24 Lincoln Avenue, North Tonawanda, New York. Schaller knocked on the door which was opened by the petitioner who was alone in his apartment at the time. What transpired at this point can best be portrayed by the following excerpt taken from the testimony of Agent Schaller (308-12):

> "The Witness: I followed Mr. Hall into the living room. I told Mr. Hall that I had come since the Merchants National Bank and Trust Company in the vicinity of Syracuse, New York, had been robbed at 8:00 o'clock that morning, and a report had been received that an automobile matching his description, matching the description of his automobile and bearing the license number of his automobile was reported to have been seen in a parking lot adjacent to the bank at about the time of the bank robbery on this day, and it also had been reported to have been seen at the time of the at the same time of the bank robbery, the day before.
>
> "I told him I would like to talk to him about his activities that week during the bank robbery. I asked him first of all of his activities on Monday, December 9, 1968, and I subsequently asked him about his activities the remainder of the days of that week."

The questioning of petitioner continued from 4:22 p. m. until 4:39 p. m. during which time petitioner gave Agent Schaller an account of his activities from December 9th up to and including December 12th, which included an exculpatory account of his activities on December 12th and which very shortly thereafter proved to be false (176-77, 188).

At 4:39 p. m. Agent Schaller requested permission to search petitioner's apartment and automobile and at 4:47 p. m. petitioner signed consents to search both his apartment and automobile (177-81 Defendant's Exhibits B and C). The search of petitioner's automobile and apartment which consisted of a living room, bedroom, kitchen and bath, took from 4:47 to 5:01 p. m. (132-33).

At the conclusion of the search, which proved to be fruitless, Agent Schaller informed petitioner that while the search was being conducted, his neighbor, a Mr. Schmidt, who occupied the front apartment, had been interviewed and that Schmidt had told the agents that he did not back petitioner's car out of the driveway that morning at 6:30 a. m. as petitioner had stated during the initial seventeen minute interrogation by Schaller and the other agents. At this point, Agent Schaller gave petitioner the *Miranda* warnings and succeeded in getting petitioner to sign a waiver thereof (318-19 Defendant's Exhibit D). The *Miranda* warnings were not given to petitioner until 5:02 p. m. (190). The interrogation of petitioner was immediately resumed after he had signed Defendant's Exhibit D, during which petitioner gave various conflicting accounts of his activities on the day of the robbery as well as prior thereto (321-29).

REASONS FOR GRANTING THE WRIT

Explication by this Court of its definition of "custodial interrogation" as contained in its decision in *Miranda v. Arizona*, 384 U. S. 436, is absolutely essential for the guidance of the thousands of trial and appellate courts which are called upon to apply the principles set forth in *Miranda* and to establish some uniformity of application.

It is difficult to conceive of any case decided by this Court in the last decade or two which has given rise to more widespread confusion and disagreement among judges and lawyers alike than the decsion of this Court in the *Miranda v. Arizona* case as it relates itself to what constitutes the "custodial interrogation" which triggers the need for giving a suspect the so-called *Miranda* warnings. These warnings mandated by *Miranda* are plainly and concisely set out in the opinion of the Court. However, the problem arises when the lower courts are called upon to decide the question as to what constitutes the custodial interrogation making necessary the giving of such warnings.

As all who are concerned with this problem know, the opinion in *Miranda* defined "custodial interrogation" in the following terms:

> "* * *. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or *otherwise deprived of his freedom of action in any significant way.* * * *." (384 U. S. at 444—emphasis supplied)

The confusion and disagreement among judges and lawyers mentioned above springs from the difficulty in construing the real meaning of italicized words in the Court's definition. It might be added that the footnote in the

Court's opinion in connection with this definition to the effect that—4. "This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused"—only served to add to the dilemma.

That petitioner does not stand alone in recognizing the prevalence of this problem is clearly shown in the opening paragraph of the opinion of Judge Friendly in the instant case, which reads as follows (A. 738):*

> Friendly, Circuit Judge:
>
> "This appeal from a conviction for bank robbery * * * vindicates the observation by a penetrating scholar: 'Probably the most difficult and frequently raised question in the wake of [Miranda v. Arizona, 384 U. S. 436 (1966)] is what constitutes the "in-custody interrogation" or "custodial questioning" which must be preceded by the Miranda warnings'."

In *People v. P.*, 21 N. Y. 2d 1 at page 4, Judge Keating, who wrote the majority opinion, made the observation that although it is clear that a person who has been formally arrested and physically detained must be given the warnings, the problem arises in cases where a person is not formally arrested and taken into custody but is questioned by a policeman who, it is reasonably clear, intends to arrest him but who has not done so at the time of the questioning. In the dissenting opinion in the same case, Judge Burke, with whom Judge Fuld concurred, made the observation that some of the language of the *Miranda* opinion was so imprecise as to cause the courts of different states to arrive at various interpretations of what the Supreme Court meant by "deprived of his freedom of action in any significant way" (21 N. Y. 2d at 12).

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* (Numbers in parentheses preceded by letter "A" refer to pages in the appendix annexed hereto.)

Some of the areas of disagreement among the various federal circuit courts, as well as the state courts, relate to relative importance of such things as the amount of "focus" which had centered on the suspect; how the suspect, himself, perceived his situation, and the fact that the police would or would not detain the suspect if he attempted to leave the scene.

Since petitions of this nature must of necessity be limited in length, we will confine ourselves to calling the Court's attention to a few of the cases we feel are in direct conflict.

In the instant case, the opinion of the Court below makes it very clear that the focus question is not the appropriate test (A. 742). Judge Friendly defined "custodial interrogation" as it is used in *Miranda* to mean "* * * that in the absence of actual arrest something must be said or done by the authorities, either in their manner or approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so. * * *" (A. 746). We interpret this to mean that there must be showing of implied physical custody—a very narrow interpretation indeed. While adopting a much broader rule to be applied in determining the existence of "custodial interrogation" than the Court below in this case, the Ninth Circuit in *Lowe v. United States,* 407 F. 2d 1391, agreed that *Miranda* clearly abandoned "focus of investigation" as a test to determine when rights attach in confession cases, citing *Hoffa v. United States,* 385 U. S. 293.

On the other hand, in *Windsor v. United States,* 389 F. 2d 530, 5th Cir., the defendant had been advised that he was not under arrest and was free to go before the questioning commenced. Yet the Fifth Circuit held that since the

"focus" of the investigation was clearly on the defendant at the time, his rights under *Miranda* had been violated and reversed the conviction. The United States Court of Appeals for the District of Columbia in *Allen v. United States*, 390 F. 2d 476, apparently takes the same view concerning "focus" as the Fifth Circuit did in the *Windsor* case because the opinion, while holding that the investigation of Allen was more in the nature of on-the-scene questioning, it did so only because the interrogating officer did not have sufficient information at the time to make Allen the focus of the investigation. See also *Agius v. United States*, 413 F. 2d 915, 5th Cir., where the Court placed much emphasis on the element of focus. Also *People v. Paulin*, decided December 4, 1969 by the New York Court of Appeals and not officially reported as yet, where much emphasis was placed on focus (See 6 Crim. Law Reporter 2265).

In its opinion in the instant case the Court below indicated that the manner in which petitioner perceived his situation was immaterial (A. 744-45). The First Circuit, in *Freije v. United States*, 408 F. 2d 100, 103, seems to agree with this view since it held that even if Freije actually believed that he was not free to leave the police station it would not necessarily follow that he was entitled to the *Miranda* warnings. On the other hand, the New York Court of Appeals, in *People v. P.*, 21 N.Y. 2d 1, 9, adopted the view that custody occurs if the *suspect* is led to believe, as a reasonable man, that he is being deprived of his freedom (Emphasis supplied). The Supreme Court of California, in *People v. Arnold*, 66 Cal. 2d 438; 58 Cal. Rptr. 115; 426 P. 2d 515, also seems to adopt this view.

On December 12, 1969, the New York Court of Appeals, in a case not yet officially reported: *People v. Yukl*, ____

N. Y. 2d ____ (See 6 Crim. Law Reporter 2289), seems to have reversed the view taken in *People v. P., supra.* In the *Yukl* case the Court of Appeals said:

> "In deciding whether a defendant was in custody prior to receiving his warnings, the subjective beliefs of the defendant are not to be the determinative factor. The test is not what the defendant thought, but rather what a reasonable man, innocent of any crime, would have thought had he been in the defendant's position. (Citing cases)"

The Courts have also differed as to what importance, if any, should be attached to the fact that the police did or did not form an intent to arrest the suspect. For instance, in *Allen v. United States,* 390 F. 2d 476, 479 App. Ct. D. C., the Court relied heavily upon the fact that when the officer was questioning Allen, he had not yet formed an intent to arrest him. The opposite view was taken by the Ninth Circuit in *Lowe v. United States,* 407 F. 2d 1391, 1397, wherein the court explicitly stated that the point at which the officer forms an intent to arrest has no bearing on the question of whether or not the accused was "in custody".

Whatever the true meaning of the words—"or otherwise deprives of his freedom of action in any significant way"—as used in *Miranda,* we believe the meaning given to them by the Court below is incorrect. It is entirely too narrow. It would forbid temporary custody in connection with on-the-scene questioning which is expressly allowed by *Miranda* (See *Allen v. United States,* 390 Fed. 476, 478-79); and in other situations, it would require a showing of actual, implied—as opposed to expressed—physical custody before *Miranda* would come into play. It would appear to ignore the oppressive effect that a given situation would have upon a given person and limit the inquiry as

to whether or not the suspect was in actual physical custody, expressed or implied.

For the sake of limiting the length of this petition we will not discuss the second question relating to whether or not petitioner knowingly and voluntarily waived his rights when he signed Defendant's Exhibit D, the standard F. B. I. waiver form. We do, however, respectfully reserve our right to argue this point should this petition be granted.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

—o—

No. 239—September Term, 1969.

(Argued November 4, 1969 Decided December 15, 1969.)

Docket No. 33692

—o—

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

GLENN W. HALL,
Defendant-Appellant.

—o—

Before:

WATERMAN, FRIENDLY and SMITH,
Circuit Judges.

—o—

Appeal from a judgment of the District Court for the Northern District of New York, Lloyd P. MacMahon, *Judge,** convicting defendant, after a verdict, of robbing a bank in violation of 18 U.S.C. § 2113(a). Affirmed.

—o—

JAMES P. SHANAHAN, Assistant United States Attorney (James M. Sullivan, Jr., United States Attorney for the Northern District of New York, Syracuse, New York, of Counsel), *for Plaintiff-Appellee.*

* Of the Southern District of New York, sitting by designation.

WILLIAM B. MAHONEY, Esq. (John B. Corcoran, Esq., Buffalo, New York, of Counsel), *for Defendant-Appellant.*

———o———

FRIENDLY, *Circuit Judge:*

This appeal from a conviction for bank robbery, 18 U. S. C. § 2113(a), vindicates the observation by a penetrating scholar: "Probably the most difficult and frequently raised question in the wake of [*Miranda* v. *Arizona,* 384 U.S. 436 (1966)] is what constitutes the 'in-custody interrogation' or 'custodial questioning' which must be preceded by the *Miranda* warnings."[1]

The bank robbed was the Cicero, N. Y., branch of The Merchants National Bank & Trust Co. of Syracuse. At approximately 7:55 A.M. on Thursday, December 12, 1968, Mrs. Richer, the head teller, parked her automobile at the rear of the bank. Approaching it, she sensed she was being followed. A man wearing a stocking mask over his face and carrying a rifle directed her into the bank. He herded Mrs. Richer, Mr. Corbett, the assistant manager, and two other tellers into a vault. There he instructed Mrs. Richer to put the cash, $37,872.44, into a bag and give him the keys to her car. He then made his exit. Later Mrs. Richer saw her car in the parking lot of a bowling alley some 100′ away from the back parking lot of the bank.

Unfortunately for the robber, an observant young lady, Barabara Costick, had driven onto the bowling alley parking lot around 7:45 A.M. She saw a maroon or red colored car backed up against the edge of the parking lot and

[1] Kamisar, "Custodial Interrogation" within the Meaning of *Miranda,* in Criminal Law and the Constitution, 335 (1968).

facing the rear of the bank. After letting off her brother Stanley, who worked in the bowling alley, she noticed that the man in the car was wearing a gray hat and topcoat—a description of the robber's costume generally tallying with Mrs. Richer's. As Miss Costick drove by, the man put his left arm up to the window to shield his face. She was sufficiently struck by this conduct to look at the license plate and, after driving a hundred yards or so and coming to a stop, to write down on a card the number—OA 1587. About five minutes later, Stanley Costick noticed that the red car, which he identified as a Chevrolet, had moved to the other side of the parking lot closer to the bank. Later observation of footprints in the snow by a county sheriff made it evident that the robber had walked from this position up to the bank parking lot and had returned to the same position from Mrs. Richer's car.

The license number was speedly traced to the Syracuse office of Employers Insurance Co. of Wausau. Investigation there showed that a Chevrolet car bearing that number had been assigned to defendant Hall, who had been a sales trainee in the Syracuse office but had later been transferred to Buffalo.

At 4:22 P.M. Special Agent Schaller and two other F.B.I. agents arrived at Hall's apartment in North Tonawanda, N. Y. The apartment, in the rear of the first floor of a three family dwelling, was a small one, with a living room some 12′ x 14′ furnished with a couch and two chairs, a kitchen, a bedroom and bath. After identifying himself and his companions, Schaller told Hall they would like to come in and speak to him. He said they were welcome. Schaller related that a bank near Syracuse had been robbed that morning, that a car tallying Hall's in description and license number had then been observed

nearby, and that he would like to talk to Hall about the latter's activities during the week of December 9 to 12.

Hall stated, apparently truthfully up to a certain point, that he had been in Syracuse on business on Monday, December 9, and had returned to North Tonawanda on Tuesday afternoon, had spent Wednesday in the insurance company office, and, after an evening with his girl friend, had parked his car in a driveway at his home behind a car owned by Schmidt, his neighbor. Since Schmidt often departed earlier in the morning, Hall long before this had given Schmidt a set of keys to the car so that Schmidt could move it out of the way. Hall said that when he arose around 9:00 A.M. on December 12, the car was parked in front of his house; he left around 10:30 A.M., picked up a Christmas tree, arrived at the office about 11:30 A.M., had lunch with the manager, Mr. Tyler, and departed around 1 P.M. After some seventeen minutes Schaller sought permission to search the apartment and the car, and Hall signed waivers and consents. No money was found.

The interview was resumed shortly after 5 P.M. Schaller advised that Schmidt had been interviewed and had said that he had not moved Hall's car that morning because it was not in the driveway when he arose at 6:30 A.M. Schaller then told Hall "that he did not have to further answer any questions, that anything he might say to me further could be used against him in court, that he was entitled to an attorney, to have an attorney present during any interviews," and that "if he could not afford an attorney, the Government would provide an attorney for him." Schaller also advised Hall that he could waive his rights if he desired, and, in that event, if he decided to stop answering questions at any time,

he could do so. After stating that he understood his rights and desired to waive them and continue the interview, Hall executed the standard F.B.I. waiver form.

When he was again asked to trace his activities on December 11 and 12, Hall at first stuck to his story. Later, under the impulsion of the Agents' telling him something his girl friend had related to them, he added that, while in Syracuse on December 10, he had sold some stock for $3000 to get his share of $6000 down payment on a house he planned to occupy with the girl, then pregnant, whom he intended to marry as soon as he could obtain a divorce. On being told that he could not have obtained payment for the stock so quickly, he altered his statement to say that he had sold the stock four weeks earlier and on December 10 had obtained a $3000 check which he placed in a safe deposit box in Syracuse. Finally when Agent Schaller indicated an intention to check this story out with the broker in Syracuse, Hall admitted he had not been telling the truth and said he now wanted to do so. The new version was that he had indeed left his home early in the morning of December 12 in order to keep a rendezvous with a "loan shark" in the parking lot of the Maple Leaf Motel on Niagara Falls Boulevard. One Jimmy, a co-owner of a bar adjacent to the motel, had agreed to negotiate a $3000 loan for him from the unindentified "loan shark," who would telephone Hall where and when to get the money. Around 7:30 A.M. the loan shark arrived and handed Hall an envelope containing $3000, including a $1000 bill and other $100's, $50's, $20's and $10's. On Schaller's request Hall produced his wallet which contained three $100 bills. Hall admitted that during the morning of December 12 he had made a deposit of $1000 at one bank in North Tonawanda and of $2000 at another.

The serious question concerns the initial seventeen minutes of questioning which elicited the false exculpatory statement that Hall's car was in front of his apartment at 9:00 A.M. The parties have devoted a large portion of their briefs and arguments to whether during this period Hall had become the "focus" of the investigation. As put, the question is unanswerable. Certainly the agents had "focused" on Hall more than on all residents of Cicero or on other residents of North Tonawanda; on the other hand the focus was not so sharp that they had anything approaching certain, indeed even probable cause to believe he was the robber. Furthermore, the "focus" question, derived from *Escobedo* v. *Illinois,* 378 U.S. 478, 490-91, 492 (1964), is not the appropriate test. The phrase was there used in an effort to define the point when the Sixth Amendment forbids the deprivation of a suspect's access to his lawyer. Moreover, the coming of that point was defined not in terms of "focus" alone but of focus plus. It is well to attend to precisely what the Court said: "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectly warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution . . . ." 378 U.S. at 490-91. "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused *and* its purpose is to elicit a confession—our adversary system begins to

operate, and, *under the circumstances here,* the accused must be permitted to consult with his lawyer." 378 U.S. at 492. [Emphasis supplied.] No claim is or could reasonably be made here that the early questioning of Hall violated Sixth Amendment rights.

It is equally plain that "focus" alone does not trigger the need for *Miranda* warnings. As appears from the first *Escobedo* extract we have quoted, custody as well as focus and other factors were essential to that decision. Under *Miranda* custody alone suffices. 384 U.S. at 444, 478. We fail to perceive how one can reason from these two propositions to a conclusion that "focus" alone is enough to bring *Miranda* into play. The only possible basis for such an argument would be that, after limiting *Miranda* to custodial interrogation and defining this as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," 384 U.S. at 444, Chief Justice Warren dropped a footnote:

> 4. This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

While much dialectic skill has been expended on this footnote, see Graham, What Is "Custodial Interrogation?": California's Anticipatory Application of *Miranda* v. *Arizona,* 14 U.C.L.A. L.Rev. 59, 114-15; *Kamisar, supra,* at 339-40, the one thing that is undeniable is that the opinion said that focus means custody, not that custody means focus. As Professor Kamisar has put it, "*Miranda's* use of 'custodial interrogation' actually marks a *fresh start* in describing the point at which the Constitutional protection begins," *id.*—Fifth Amendment protections, that is.

This still leaves the courts with the far from easy task of determining whether questioning was initiated "after

a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. The only two relevant Supreme Court decisions since *Miranda* shed little light. In *Mathis* v. *United States,* 391 U.S. 1 (1968), the person interrogated by a federal revenue agent was in custody under any standard; he was in a state prison serving a sentence for a wholly unrelated crime. If the decision has any significance here, which may be doubtful, it would be that the Court favors a rule-of-thumb approach, assumed to be easily applicable, rather than a detailed inquiry into the coerciveness of the "custody" in the particular case since, as pointed out in Mr. Justice White's dissent, Mathis was not coerced into answering the questions "any more than is the citizen interviewed at home by a revenue agent or interviewed in a Revenue Service office to which citizens are requested to come for interviews." (391 U.S. at 7. *Orozco* v. *Texas,* 394 U.S. 324 (1969), put beyond doubt that custodial interrogation may take place outside the station-house, as the *Miranda* opinion had rather clearly indicated although none of the four cases there decided had presented the point. But the officers conceded that "from the moment he [Orozco] gave his name . . . petitioner was not free to go where he pleased but was 'under arrest,'" 394 U.S. at 325, and the decision rested upon that, 394 U.S. at 327.

Schaller was not asked concerning his intentions about holding Hall during the first stage of the interview, and Hall did not say how he regarded his situation. Doubtless this was just as well. The Court could scarcely have intended the issue whether the person being interrogated had "been taken into custody or otherwise deprived of his liberty in any significant way" to be decided by swearing

contests in which officers would regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd, and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them. Moreover, any formulation making the need for *Miranda* warnings depend upon how each individual being questioned perceived his situation would require a prescience neither the police nor anyone else possesses. On the other hand, a standard hinging on the inner intentions of the police would fail to recognize *Miranda's* concern with the coercive effect of the "atmosphere" from the point of view of the person being questioned.

The test must thus be an objective one. Clearly the Court meant that *something* more than official interrogation must be shown. It is hard to suppose that suspicion alone was thought to constitute that something; almost all official interrogation of persons who later become criminal defendants stems from that very source. While the Court's language in *Miranda* was imprecise, doubtless deliberately so, it conveys a flavor of some affirmative action by the authorities other than polite interrogation. This view is strengthened by the passage at 384 U.S. 478, where the Chief Justice, after referring to "the compelling atmosphere inherent in the process of in-custody interrogation" and just before a second and slightly altered affirmation of the test, inserted a footnote reading:

> 46. The distinction and its significance has been aptly described in the opinion of a Scottish court:
>
> "In former times such questioning, if undertaken, would be conducted by police officers visiting the

> house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice [of interrogation at the police station] may be it must normally create a situation very unfavorable to the suspect." *Chalmers* v. *H. M. Advocate* [1954], Sess. Cas. 66, 78 (J.C.)

Even without the light of *Orozco* we would not have thought this to mean that questioning in the home could never come within the mandate of *Miranda;* we do think it suggests that in the absence of actual arrest something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so. This is not to say that the amount of information possessed by the police, and the consequent acuity of their "focus," is irrelevant. The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda,* and *vice versa.* But this is simply one circumstance, to be weighed with all the others. Although the many relevant decisions of state and lower federal courts since *Miranda,* none of which were cited to us, have not been altogether uniform, this seems the thrust of *People* v. *Arnold,* 58 Cal. Rptr. 115, 120-21, 426 P.2d 515, 520-21 (1967); *People* v. *P.,* 21 N.Y.2d 1, 286 N.Y.S.2d 225, 233 N.E.2d 255 (1967); *United States* v. *Gibson,* 392 F.2d 373 (4 Cir. 1968); *Lowe* v. *United States,* 407 F.2d 1391, 1396-7 (9 Cir. 1969); and *Freije* v. *United States,* 408 F.2d 100, 103 (1 Cir. 1969). See also *Allen* v. *United States,* 390 F.2d 476 (D.C. Cir. 1968); *United States* v. *Knight,* 395 F.2d 971, 976 (2 Cir.

1968) (Lumbard, *C.J.*, concurring); and *Government of Virgin Islands* v. *Berne*, 412 F.2d 1055 (3 Cir. 1969).[2]

The *Gibson* case is closer to this one than any other we have found. There the West Virginia police had received information that Gibson was driving a stolen car with Indiana license plates bearing a designated number. They located the car outside a bar where Gibson was seated. An officer invited him outside and asked whether the car was his; after initial denial, he admitted it was and produced a registration which showed alteration. The police then arrested him and gave the warnings. Writing for the court, Judge Sobeloff did "not read *Miranda* as requiring officers to preface with a warning all non-coercive questioning conducted in the course of a routine investigation as in the circumstances of this case. . . . In the complete absence of the element of coercion, actual or potential, or police dominance of the individual's will, the mild police activity shown here should not prevent the introduction of statements freely made." 392 F.2d at 376. While the instant case is a bit stronger for the defendant in the restricted size of his quarters, the number of officers present, and the somewhat more extensive questioning, these factors must be weighed against the point that the only piece of information the agents then had was the presence of Hall's car near the scene and at the time of the robbery. Although this was suspicious, it could have been thought susceptible of innocent explanation, espe-

[2] We disagree with some of the language although not with the result in *Windsor* v. *United States*, 389 F. 2d 530 (5 Cir. 1968). The language seems to have been substantially qualified by *Jennings* v. *United States*, 391 F. 2d 512 (5 Cir. 1968); *Archer* v. *United States*, 393 F. 2d 124 (5 Cir. 1968); and *McMillian* v. *United States*, 399 F. 2d 478 (5 Cir. 1968). For a case regarded by the Fifth Circuit as falling on the same side of the line as *Windsor*, see *Agius* v. *United States*, 413 F. 2d 915 (5th Cir. 1969).

cially since Hall's work apparently often took him near Syracuse.

It is altogether too easy to fall into the error of allowing the first seventeen minutes of interrogation to be significantly colored by what developed later. The picture presented to us is one of F.B.I. agents conscientiously interviewing a man, engaged in a respectable occupation, who was under considerable suspicion but whom they knew they could not lawfully arrest, and sedulously abstaining from any threat that they would. We have no reason to believe the agents would not have departed on request or allowed Hall to do so—as indeed they did the next morning when he indicated a desire to see his lawyer —although they might well have kept him under surveillance. It is immaterial that if Hall had attempted to bolt, thereby furnishing added evidence of guilt, the agents would doubtless have restrained him. *People* v. *P., supra,* 21 N.Y.2d at 10, 286 N.Y.S.2d at 233. Since we agree with the district judge that the initial interrogation was not during a period when Hall was in custody or his liberty was significantly restrained, we have no occasion to consider whether such a finding is subject to full appellate review or is protected by something akin to the "unless clearly erroneous" rule. And since we hold the false exculpatory remark was properly received in evidence, there is no need for us to pass on the Government's alternative argument that any error in its admission was harmless.

Once this point is passed, little remains. We see no reason to question the district judge's finding that the *Miranda* waivers were freely and voluntarily given with full knowledge by Hall of his right not to do this; evidently Hall was still persuaded that he could talk his

way out, or at least thought he had little to lose by trying. The case bears no resemblance to *Westover* v. *United States,* 384 U.S. 436, 494 (1966), on which Hall relies. There is equally little merit in the claim that, even with all of Hall's statements thus properly received, the evidence was still insufficient for submission to the jury. The prosecutor adduced considerable testimony of Hall's guilt in addition to what we have recounted: The head teller of the bank described the robber as carrying a long-barrelled gun with a brown stock, and the assistant manager added that it was a lever action rifle of the Winchester type. Late in the evening of December 12, Hall, after consulting with his attorney by telephone, turned over to the agents a rifle that the assistant manager positively identified as fitting the description of the one he had seen. The head teller remembered that the stolen money included a $1000 bill with a tear, extending down to the face of President Cleveland, and Hall deposited a torn $1000 bill in Buffalo later that morning. The force of this was not destroyed but only somewhat impaired by the head teller's belief that the location of the tear on her $1000 bill was slightly different from that on the one produced at trial. At 9:37 A.M. on December 12, a telephone call from Churchville, N. Y., some ten to fifteen miles west of Rochester, to the New York Telephone Company's business office in Tonawanda where Hall's girl friend worked, was charged to Hall's credit card number. The time and place were wholly consistent with a departure from Cicero shortly after 8 A.M. and arrival in North Tonawanda around 10:30 A.M. While it is possible, as the defense contends, that someone else made the call and charged it to Hall's account, the jury was entitled to a high degree of scepticism on that score. Against all this, plus Hall's insistence on lunching with

his employer on December 12, and the failure of the defense to produce "Jimmy," minor discrepancies in the testimony of the prosecution's witnesses and the break-down of an attempted line-up identification of Hall, by a resident of a town near Cicero, as the occupant of a red Chevrolet, seen in the bowling alley parking lot at 6:30 A.M. on December 12, are not impressive. The Government argued plausibly that Hall would hardly have arrived in the Cicero parking lot so early, and even if the jury did not accept this, it could have found that the witness' failure to identify Hall was an understandable error. In our view the Government's case, built on a combination of Miss Costick's perspicacity and painstaking investigative work by the F.B.I., was not merely sufficient but strong.

Affirmed.